

BEFORE THE  
NEBRASKA PUBLIC SERVICE COMMISSION

In the matter of the Commission, on	)	Rule & Regulation No. 161
its own motion, seeking to amend	)	
Title 291, Chapter 1, Rules of	)	
Commission Procedure, to rewrite a	)	
substantial portion of the rules; correct	)	
technical errors, grammar, punctuation,	)	
spelling, sequential numbering and the	)	
like; and reprint the chapter in its	)	
entirety.	)	

**COMMENTS OF THE  
NEBRASKA TELECOMMUNICATIONS ASSOCIATION**

By Order entered August 31, 2004, the Nebraska Public Service Commission (“Commission”) entered an Order attached to which was a draft (Appendix A) of proposed revisions to the Rules of Commission Procedure. The Commission designated the proceeding as a rulemaking proceeding docketed as Rule & Regulation No. 161. The Commission Order opening the docket invited interested parties to submit comments on the proposed rules and regulations by October 15, 2004.

It has been a substantial period of time since the Rules of Commission Procedure have been rewritten in their entirety. Periodically, various sections have been rewritten following statutory amendment or preemptive action by the federal government. The Nebraska Telecommunications Association (“NTA”) wishes to commend the Commission for taking the initiative to update the subject rules. The NTA is appreciative of this opportunity to provide its comments. Following are the comments of the NTA for the Commission’s consideration.

The comments appear in chronological order identified by the rule's section number.

005.08B / 005.09 Answer to Departmental Complaint:

The NTA recommends that the timeframes in these two rules be consistent. If a statement of satisfaction is not filed under Rule 005.08B, the defendant has 15 days from service of the complaint to file an answer. However, under Rule 005.09, an answer to a departmental complaint shall be filed with the Commission within 20 days after service of the complaint. It is respectfully recommended that both rules allow for a 20 day period of time for either the filing of the statement of satisfaction or the answer to the complaint.

010.02 Computation:

A portion of the rule states, "When the period of time prescribed or allowed is less than ~~five~~eleven days, intermediate Saturdays, Sundays and holidays will be excluded in the computation." It is the suggestion of the NTA that deadlines of less than eleven days not exclude weekends and holidays. This segment of the rule creates a separate computation method for those deadlines which are longer than ten days. In order to be consistent, it is recommended that the counting of Saturdays, Sundays and holidays not be excluded from any computation.

#### 014.01 Content of Protests, Failure to File:

It appears that a word is missing from the last clause of this rule. It is recommended that the word “participation” be inserted so that the conclusion of the rule reads:

. . . , except to the extent that informal intervention or public **participation** may be allowed as provided in this chapter.

#### 015.01 Formal Intervention; Status:

Substantial changes were made to this entire section relating to formal intervention. As the Commission is aware, the NTA has, on a number of occasions, intervened on behalf of its members. The proposed rule and the subparts thereunder state that the NTA would have to demonstrate that its legal rights, duties, privileges, immunities or other legal interests were being substantially affected by the proceeding. NTA members’ interests may well be impacted, but the NTA itself may not have similar rights or privileges at issue. The NTA believes the right to formally intervene without being required to show more than the NTA members’ rights, duties or privileges, etc. may be impacted should be maintained.

New language was added to Rule 0015.01D which states, “the Commission may limit the Formal Intervenor’s participation in the proceedings either at the time that intervention is granted or a subsequent time.” Historically, Formal Intervenors have been entitled to the full rights of a party. Proposed Rule 0015.01D and its subparts would allow the Commission to severely limit a Formal Intervenor’s participation in a proceeding. Any intervenor would not know at the time of its intervention what rights of participation it would have.

There are a number of occasions where a party does not wish to formally protest a matter, but wishes to formally intervene to preserve its rights to participate. Under the proposed rules, it would appear that anyone seeking Formal Intervenor status is at risk of having its participation rights restricted. Rule 015.02B indicates that a Formal Intervenor might be relegated to the position of an Informal Intervenor, and therefore have its participation in the proceedings restricted to that of an Informal Intervenor whose rights are severely restricted by Rule 015.02C. The same restrictions do not apply to a party protesting an application. If the rule is adopted as drafted, it will force parties to become formal protestants in order that their participation might not be restricted by the Commission at some point in the proceeding.

015.02C Participation in Proceedings:

The NTA would recommend the words of the last sentence be rearranged so as to read as follows:

An informal intervenor shall not be permitted to engage in discovery nor to cross-examine or otherwise interrogate the witnesses called by any party in the proceeding.

The NTA believes the modification proposed makes the intent of the sentence clearer.

016 Contested Cases Prohibition Against Ex Parte Communications:

It is respectfully suggested that the rule be redrafted so as to require compliance with the Nebraska Administrative Procedure Act (“APA”) with relation to ex parte communications. The rule could simply refer to the APA, NEB. REV. STAT. § 84-914(6).

#### 018.01 General:

It is respectfully suggested that this rule relating to admissible evidence simply make reference to the APA, NEB. REV. STAT. § 84-914, in which case the remaining subsections 018.01A through 018.01H could be deleted.

#### 019 Motions:

This section could be modified so that motions are identified as previously defined in section 001.01L.

#### 019.04 Ruling:

The Commission may want to consider whether a decision of the hearing officer could be appealed to the full Commission. Obviously, there are divergent views on this issue. Some might suggest the hearing officer is the final decision maker in the matter presuming it is not a dispositive motion, and therefore no appeal should be available. Others may advocate that the full Commission should have an opportunity to overrule a hearing officer in the event the full Commission is so inclined. It is suggested that the Commission discuss this matter so that it might reach a philosophical agreement on the issue.

The language deleted from the current rule called for the hearing officer to note the ruling on the motion and mail the ruling to the parties and attorney's of record. The NTA believes this language should be retained. All parties should be formally advised of any written motions ruled on by the Commission.

#### 020.03 Testimony: Modified Procedure:

The first clause of the first sentence needs to be modified to read as follows:

An application which is not protested *or in which no petition for intervention has been filed* may on applicant's motion: . . .

It is unlikely the Commission would process any application by affidavits administratively if there were Formal or Informal Interventions filed.

023 Appeals: / 023.03 Procedure:

Rule 023 provides that a party wishing to appeal a Commission decision should do so in accordance with the APA. Rule 023.03 appears to be duplicative of Rule 023. Rule 023.03 could be deleted.

023.02 Indirect Appeal; Motion for Rehearing:

Historically, motions of the nature described in this rule have been cast as motions for reconsideration / rehearing. The title of the rule refers to motion for "rehearing." All references in the subrules in 023.02A refer to "reconsideration" and not "rehearing." The rule needs to be consistent in its language.

The Commission may wish to retain the right to determine whether it will entertain motions for reconsideration, asking only that the ruling be changed. Alternatively, the Commission may want to entertain a motion for rehearing in which case the matter would be considered for rehearing on the merits. It does not appear the APA provides for motions for reconsideration / rehearing. However, the APA only establishes minimum administrative procedures for state agencies. The motion for reconsideration / rehearing has been a long-standing Commission practice and one the Commission may be reluctant to relinquish.

#### 023.02E Appeal Deadline Not Tolled:

By not tolling the timeframe for the filing of an appeal, the likelihood that any party is going to file a motion for rehearing or reconsideration is remote. Under current procedures, the time for filing an appeal with the court is tolled until an order in the motion for reconsideration / rehearing has been entered. The current process is consistent with the concept of “exhaustion of administrative remedies.”

Parties would have no idea when or if the Commission was going to rule within the 25 day timeframe established by the proposed rule. Under the proposed rule, the Commission is not even required, but may elect, to rule on a motion for reconsideration. If the Commission ruled on the 25th day, a party would have five days to prepare and file its appeal. Parties would be forced to appeal the matter before any ruling on the motion for reconsideration or rehearing might be forthcoming in order to protect its right to appeal. The rule as proposed would eliminate the likelihood of any party ever filing for a motion for reconsideration or rehearing.

### **CONCLUSION**

The proposed Rules of Procedure makes some significant changes to the existing rules. The impact of several of the changes is difficult to predict. The NTA believes this docket is one which particularly lends itself to a workshop of practitioners and interested parties. The input of various participants in the workshop, particularly those who practice before the Commission would be extremely valuable. Candid discussions in a forum where hypothetical questions and fact patterns could be discussed would be beneficial to all. The NTA would therefore recommend that the Commission schedule a

workshop to address the rewrite of the Rules of Procedure before the next draft of the rules are completed.

The NTA appreciates the opportunity to comment on the proposed Rules of Commission Procedure. Should any further activity on behalf of the NTA be required, please advise.

DATED this 15th day of October, 2004.

Respectfully submitted,

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ASSOCIATION

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